UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

David Saxe Productions, LLC		
	Case No.	**28-CA-219225**
V Theater Group, LLC		**28-CA-223339**
		28-CA-223362
and		**28-CA-223376**
		28-CA-224119
International Alliance of Theatrical Stage Employees		**28-RC-219130**

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RESPONDENTS DAVID SAXE PRODUCTIONS AND V THEATER GROUP, LLC'S ANSWERING BRIEF TO GENERAL COUNSEL'S CROSS-EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION AND RECOMMENDED ORDER

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I. INTRODUCTION.

The Administrative Law Judge's Decision and Recommended Order ("ALJD") in this matter contains numerous errors of fact, law, and policy as detailed in Respondents' Brief in Support of its Exceptions. However, with respect to the handful of issues identified in Cross-Exceptions 1-3 filed by the Counsel for the General Counsel ("CGC"), the Administrative Law Judge ("ALJ") correctly found in favor of David Saxe Productions, LLC and V Theater Group, LLC ("Respondents"). Specifically, the ALJ properly determined Respondents' Email and Communications Policy was lawful, Respondents did not promulgate an overly broad rule or directive concerning employee communications, and the ALJ appropriately declined to issue a broad cease and desist order.[1] As such, Respondents' respectfully request the Board reject the cross-exceptions addressed in the CGC's Brief in Support of its Cross-Exceptions ("CGCCE") and grant Respondents' previously-filed exceptions.

II. FACTS AND ARGUMENT.

A. The ALJ Did Not Err in Finding Respondents' Restrictions on Customized Email Signature Lines Lawful (CGC Cross-Exception No. 1).

1. The Custom Email Signature Line Restriction is Lawful Under *Purple Communications* and *Boeing*.

The ALJ correctly determined that the part of the Email and Communications section of Respondents' Acceptable Use of Computers policy prohibiting employees from using "custom signature lines containing personalized quotes, personal agendas, solicitations, etc." did not constitute an overly-broad or discriminatory rule as alleged in Paragraph 5(b)(1) of the Consolidated Complaint. **GC 1** at ¶5(b)(1). While the ALJ did both misstate and misapply the

[1] In terms of CGC's Cross-Exception No. 4, Respondents do not dispute that the Union's name was incorrectly abbreviated in the recommended Notice to Employees and Explanation of Rights. However, Respondents deny engaging in conduct warranting the posting of such a notice.

presumption in Purple Communications, 361 NLRB 1050, 1054 (2014) that employees who have been given access to their employer's email system in the course of their work are entitled to use the system to engage in statutorily protected discussions about their terms and conditions of employment while on nonworking time, absent a showing by the employer of special circumstances that justify specific restrictions, the ALJ nonetheless properly concluded that Respondents' restriction on using custom signature lines in company email did not violate the Act.

The Complaint does not allege and no evidence was presented by the CGC or the Union establishing that Respondents' prohibited employees from using their email systems for statutorily protected communications during nonworking time.[2] The Complaint also does not allege and no evidence was offered by the CGC or the Union establishing that the particular prohibition on employees using custom email signature lines containing personalized quotes, personal agendas, solicitations, etc.: (1) expressly restricts activities protected by Section 7 of the Act; (2) was promulgated in response to union activity; or (3) applied to restrict the exercise of Section 7 rights. See **GC 1** at ¶5(b)(1). Thus, the only issue is whether or not such a facially neutral workplace rule unlawfully interferes with the exercise of rights protected by the Act using the analysis set forth in The Boeing Co., 365 N.L.R.B. No. 154 (Dec. 14, 2017).

In Boeing, the Board overruled Lutheran Heritage Village-Livonia, 343 NLRB 646 (2004), which articulated the Board's previous standard governing whether facially neutral workplace rules, policies and employee handbook provisions unlawfully interfere with the exercise of rights

[2] Indeed, Respondents' Acceptable Use of Computers policy provides for a measure of casual, non-excessive personal use of company email and Internet connection. See GC 99 at DSP2-25 to DSP2-27; DSP2-72 to DSP2-75.

protected by the Act. Under the Lutheran Heritage standard, the Board found that employers violated the Act by maintaining workplace rules that do not explicitly prohibit protected activities, were not adopted in response to such activities, and were not applied to restrict such activities, if the rules would be "reasonably construed" by an employee to prohibit the exercise of NLRA rights. In place of the Lutheran Heritage "reasonably construe" standard, the Board established a new balancing test which applies here. Under Boeing, when evaluating a facially neutral policy, rule or handbook provision that, when reasonably interpreted, would potentially interfere with the exercise of Section 7 rights, the Board will evaluate two things: (i) the nature and extent of the potential impact on Section 7 rights, and (ii) legitimate justifications associated with the rule. Under Boeing, ambiguities in rules are no longer interpreted against the drafter, and generalized provisions should not be interpreted as banning all activity that could conceivably be included.

The prohibition on employees using custom email signature lines containing personalized quotes, personal agendas, solicitations, etc. is one of eleven (11) bullet pointed examples of inappropriate materials that should not be sent or received via email or Internet (along with pornography and derogatory or inflammatory remarks about an individual's race, age, impairment, religion, national origin, physical attributes, sexual preference) in a paragraph discussing discriminatory or harassing materials that are obscene, explicit, or for any other purpose which is illegal or against the best interests of the Company. See **GC 99** at 26-27; 74-75. In such context, an employee would not reasonably interpret the limitation on customized email signature lines as potentially interfering with the exercise of Section 7 rights, the justifications associated with the rule are legitimate, and any potential impact on Section 7 rights is infinitesimal. Further, Purple Communications expressly recognizes that employers may apply uniform controls over their email

systems to the extent that such controls are necessary to maintain production and discipline, which is exactly what this portion of the policy is intended to do. Purple Commc'ns, 361 NLRB at 1063.

2. The Custom Email Signature Line Restriction is Lawful Under *Register-Guard.*

The above analysis is largely academic as the CGC now contends the Board should overrule Purple Communications and return to the standard in Register Guard, 351 NLRB 1110 (2007). Respondents' wholeheartedly concur. In Register Guard, the Board reaffirmed that employers have a basic property right to regulate and restrict employee use of company property, including its communication and email systems purchased for use in operating its business. Register Guard, 351 NLRB at 1114-16. It recognized that an employer has a legitimate business interest in maintaining the efficient operation of its e-mail system, and that employers who have invested in an e-mail system have valid concerns about such issues as preserving server space, protecting against computer viruses and dissemination of confidential information, and avoiding company liability for employees' inappropriate e-mails. Id. at 1114. Thus, consistent with numerous prior cases establishing the well-settled principle that employees have no statutory right to use an employer's equipment, the Board correctly concluded employees also have no statutory right to use their employer's communication and e-mail systems for Section 7 matters, as long as any employer usage restrictions are nondiscriminatory in nature. Id. As the Board explained, Section 7 of the Act protects organizational rights rather than particular means by which employees may seek to communicate. Id. at 1115.

Had the General Counsel taken the position at the hearing that Register Guard sets forth the proper analytic framework and given the Board's acknowledgment in Register Guard that employers who have invested in an e-mail system have valid concerns about preserving server space and protecting against computer viruses, Respondents could have provided evidence that the

restriction on employees using custom email signature lines is consistent with such concerns. By way of example, at all times relevant to the Complaint, Respondents contracted with Google/Gmail for a basic business email service that only allocates approximately 15GB of email storage space per user, a level of storage that has been exceeded by several of Respondents authorized users in the normal course of business. Allowing employees to add additional text or copy and paste pictures, logos, and icons to their email signature blocks increases the size of each and every email they generate, thereby taking up more of their already limited storage space. In addition, allowing employees to copy quotes, pictures, logos, and icons from the Internet and paste them in email signature blocks presents significant security risks because in doing so, they are also oftentimes copying hidden or embedded hyperlinks and inserting them into each email. Indeed, frequently the cut and pasted picture, logo, or icon is web coding that acts to pull the particular graphic from the originating website when the email is opened by the receiver. These types of hidden links can be used to introduce viruses and/or malware into a user's computer. It is also a common tactic for scammers and hackers. Given the significant security risk associated with embedded graphics, many spam filters and antivirus programs will block emails containing such hidden links.[3] Respondents request the Board take judicial notice of the burdens and risk involved in allowing extraneous information to be attached email signature lines. In the alternative, should the Board decide to apply Register Guard to this case, Respondents are prepared to present evidence on these issue upon remand.

[3] Other spam filters and antivirus programs treat such graphical items in emails as suspicious and proactively remove them from email signature lines leaving a blank picture placeholder with the red "x", displaying the once hidden web links, or moving the graphical material into one or more attachments to the email resulting in cluttered and unprofessional looking email communications.

With respect to assessing discriminatory enforcement of an employer usage restrictions, the Board in Register Guard modified its prior method of analysis to require evidence that an employer is drawing distinctions between permitted and prohibited usage along Section 7 lines. Id. at 1117-18 (explaining that unlawful discrimination consists of disparate treatment of activities or communications of a similar character because of their union or other Section 7-protected status). It clarified that nothing in the Act prohibits an employer from drawing lines on a non-Section 7 basis, such that an employer may draw a line between charitable solicitations and noncharitable solicitations, between solicitations of a personal nature and solicitations for the commercial sale of a product, between invitations for an organization and invitations of a personal nature, between solicitations and mere talk, and between business-related use and nonbusiness-related use. In each of these examples, explained the Board, the mere fact that union solicitation would fall on the prohibited side of the line does not establish that the rule discriminates along Section 7 lines. Id. at 1118. In the instant case, the Email and Communications section of Respondents' Acceptable Use of Computers policy prohibits *all* custom email signature lines, not based on content or Section 7-protected status. Further, the only record evidence as to enforcement of the Email and Communications section of Respondents' Acceptable Use of Computers policy is the testimony of Respondents' HR Manager in which she states she is not aware of anyone having been disciplined for violating the policy. See TR 2883:19-2884:2.

3. Email Signature Lines Are Not the Equivalent of a Union Button.

While advocating for a return to the Register Guard analytical frame work, the CGC advances the fanciful argument that email signature lines should be viewed as the "modern-day equivalent of a union button" using a grossly distorted interpretation of Republic Aviation v. NLRB, 324 U.S. 793 (1945). Indeed, Republic Aviation requires the employer to yield its property

interests to the extent necessary to ensure that employees will not be "entirely deprived" of their ability to engage in Section 7 communications in the work place and on their own time. It does not require the most convenient and or most effective means of conducting those communications, nor does it hold that employees have a statutory right to use an employer's equipment or devices for Section 7 communications. Purple Communications, 361 NLRB at 1069 (Miscimarra, J. Dissenting). Employees now have more opportunities to conduct concerted activities than any other time in history belying any argument that a prohibition on email use or signature lines would "entirely deprive" employees in this case.

If anything, email signature lines are more akin to bulletin boards than union buttons, which are also company property. There is no statutory right of an employee to use an employer's bulletin board. Mid-Mountain Foods, 332 NLRB 229, 230 (2000); see also Container Corp. of America, 244 NLRB 318 at fn. 2 (1979). Likewise, there is no right to use an employer's equipment or media. Id. Indeed, in Allied Stores of New York, 262 NLRB 985 fn. 3 (1982), the Board explained:

> There is no statutory right for an employee or a union to use an employer's bulletin boards or blackboards. The Act's prohibitions come into play only where the employer otherwise assents to employee access to the bulletin board/blackboard but discriminatorily refuses to allow the posting of union notices or messages... Therefore, Respondent could conceivably promulgate a nondiscriminatory rule denying employees any access to the bulletin boards or blackboards for any purpose."

Id.

Employers like Respondents have a significant property value interest in their email systems as they have invested in hardware, software, storage, servers, and continue to invest in virus protection and general upkeep as necessary. As such, Respondents are well within their rights to take reasonable measures, such as restricting use of custom email signature lines, to protect their email and computer systems from harm.

B. The ALJ Did Not Err in Refusing to Find Estrada Promulgated and Maintained an Overly-Broad Rule or Directive (CGC Cross-Exception No. 2).

The ALJ found that Thomas Estrada's alleged statement to Alanzi Langstaff, "I'd be careful being seen talking to Zach [Graham] if I were you" did not constitute promulgation of an unlawful rule. ALJD at 16. In support of her decision, the ALJ cites to Food Services of America, Inc., 360 NLRB 1012, 1016 fn. 11 (2014), the facts of which are similar to the facts presented in this case. In Food Services of America, Inc., a manager advised an employee that he "could have a future with the company if he stopped talking to [former employee] and try to move on." Id. at 1026. The Board found that this statement to the employee was not an unlawful rule. Id.

Importantly, Estrada denied ever making this statement to Langstaff. TR 843:21-23. Further, there is no evidence that Estrada knew of Graham's support for the union when this alleged statement was made. Estrada testified that he was not aware of the union campaign until April 2018. TR 820:1-822:25; 3101:16-23. Further, Langstaff did not offer any evidence to prove that Estrada heard his conversation with Graham or knew what they were talking about, and Langstaff believed that Estrada did not like Graham for other reasons, including the fact that Graham often flirted with Estrada's girlfriend, Kostew. Id. at 1872-74. Langstaff's testimony is also suspect because it conflicts with Estrada's obvious disinterest in the union campaign. See, e.g., TR 820:1-822:25, 844:1-14; 3106:1-3.

Nevertheless, the CGC argues that case law supports finding an unlawful rule or directive promulgation where a supervisor directs an employee not to talk to a union supporter citing Smith Auto Service, Inc., 252 NLRB 610 (1980) (supervisor told employee to stay away from former employee because he had been mixed up with the union) and Flite Chief, Inc., 229 NLRB 968, 976 (1977) (supervisor told employees "anybody that wants to keep their job better stay away from [union supporter]."). Notably, both of these cases are distinct from the facts presented here as they

both involve a directive or threat to stay away from an employee and the person whom they are directed to not speak to are identified as union supporters by management.

Assuming *arguendo* the alleged statement was made by Estrada, it does not amount to an unlawful directive against talking to union supporters as alleged by CGC as it was a single statement made to a single employee warning him to be careful; it was not *directing* him to not talk to Graham and further did not expressly indicate that Graham's union sympathies were the issue. In Miller, 334 NLRB 824, 831 (2001) the Board found an allegation that Respondent "promulgated orally" a "rule" to one employee prohibiting discussion of the subject of the union did not qualify as the promulgation of a "rule" in violation of the Act. The Board further stated, "At worst it is a directive to a single employee regarding how to behave, not a broad prohibition. At best it is only a non-coercive request that the employee not engage in union activity." Miller, 334 NLRB at 831. Here, it was a single supervisor telling a single employee to be careful being seen talking to Graham, this likewise does not serve as a "broad prohibition." Id. The ALJ was correct in determining that no unlawful rule or directive was promulgated by Estrada and the ALJ's finding should be affirmed.

C. A Broad Cease and Desist Order Is Not Proper Under the Circumstances (CGC Cross-Exception No. 3).

The Board will issue a broad cease and desist order "when a respondent is shown to have a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights." Hickmott Foods, Inc., 242 NLRB 1357, 1357 (1979). The CGC argues that the widespread and egregious nature of Respondents' alleged unfair labor practices warrants a broad cease and desist order requiring Respondents to cease and desist "in any other manner" from interfering with, restraining, or coercing its employees in the exercise of their Section 7 rights. In support of this position, CGC

paints an inaccurate portrayal of Respondents "embark[ing] upon a crusade to quash the organizing effort." CGCCE at 9. However, as discussed in detail in Respondents' Brief in Support of its Exceptions, Respondents did not engage in the alleged unfair labor practices and had legitimate, non-discriminatory reasons for the actions it took.

D. The ALJ Incorrectly Abbreviated the Union's Name (CGC Cross-Exception No. 4).

Respondents do not dispute that the Union's name was incorrectly abbreviated in the ALJ's recommended Notice to Employees and Explanation of Rights. However, for the reasons set forth in their Brief in Support of Respondents' Exceptions, Answering Brief to the Union's Cross-Exceptions, and those contained herein, Respondents deny engaging in conduct warranting the posting of such a notice.

III. CONCLUSION.

Based on the foregoing, Respondents respectfully request that GCG's Cross-Exceptions 1 through 3 be denied.

DATED this 18th day of November, 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 18, 2019, I did serve a copy of the foregoing **RESPONDENTS DAVID SAXE PRODUCTIONS, LLC AND V THEATER GROUP, LLC'S ANSWER TO GENERAL COUNSEL'S CROSS-EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION AND RECOMMENDED ORDER** upon:

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